

IN THE MATTER OF:	:	CASE NUMBERS
	:	
WILLIE A. SHEALEY, JR.,	:	BANKRUPTCY CASE
	:	NO. 05-10138-WHD
Debtor.	:	
<hr/>	:	
	:	
JO ANN POWELL,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 05-1021
v.	:	
	:	
WILLIE A. SHEALEY, JR.,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

Currently before the Court is the “Complaint to Determine Dischargeability” filed by Jo Ann Powell (hereinafter the “Creditor”) against Willie A. Shealey, Jr. (hereinafter the “Debtor”). The Creditor seeks a declaration that certain divorce-related obligations owed her by the Debtor are nondischargeable under section 523(a)(5) and (15) of the Bankruptcy Code.¹ After a half day of trial, the Court took this case under advisement. This matter falls within the subject matter jurisdiction of the Court, *see* 28 U.S.C. §§ 157(b)(2)(I); 1334.

¹ The Complaint also contained an allegation that the Debtor's discharge should be denied pursuant to section 727(a) of the Bankruptcy Code. However, the Court dismissed this count by Order entered September 15, 2006.

FINDINGS OF FACT

The Creditor and the Debtor were married and have four children, ages 8, 9, 10, and 18. The parties were divorced pursuant to a final decree entered in the Superior Court of Fayette County, Georgia on or about August 20, 2004. The divorce decree obligated the Debtor to pay debts in the amount of \$2,945.27 to the Internal Revenue Service, \$2,045.43 to Provident National Bank, \$7,068.39 to Capital One Bank, \$10,089.17 to MBNA America, and \$580.17 to Bank One. The Debtor was also ordered to pay the Creditor \$1,448.65 in child support for the parties' four minor children, to pay two-thirds of any uncovered medical expenses incurred by the children, to maintain health, dental, and vision insurance for the children, and to maintain life insurance naming the children as his beneficiary.² The Creditor retained the marital residence, which, at the time of the divorce, was worth \$240,000 and subject to a mortgage of \$150,000.

The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on January 12, 2005. When these creditors sought payment from the Creditor, the Creditor obtained a home equity line of credit against her residence in order to pay these debts.

At the time of the trial, the Creditor's income consisted of \$618.04 per month gross from her employment as an after school program aide with the Fayette County School System and \$1,238.66 per month in child support. At that time, she was seeking employment at a bank and had been studying to take the real estate licensing exam, but does

² The Debtor does not dispute the Creditor's allegation that these obligations are nondischargeable under section 523(a)(5).

not now believe that she will be able to take the exam. The Creditor owns her residence, which is worth \$265,000 and is subject to a mortgage of \$198,000, which requires payments of \$1700 per month and includes the home equity line of credit used to satisfy the debts in question. The three minor children live with the Creditor.

The Debtor has been employed by IBM for twelve years and earns \$49,000 per year. The Debtor's salary has not increased over the past three years, and the Debtor does not expect that it will increase in the future, due to the fact that IBM has been consistently outsourcing much of the work that is similar to the work that he performs. After customary payroll deductions, child support, and a charitable contribution to the United Way, the Debtor's net pay is \$718 every two weeks. The Debtor also earns approximately \$242 per month, net, from odd jobs and has approximately five shares of IBM stock worth \$80 per share. He rents an apartment in College Park for \$700 per month. The Debtor's oldest son lives with him, and his current expenses total \$2,200 per month. Additionally, above and beyond his monthly child support obligation, the Debtor has visitation with his other three children every other weekend, at which time he provides them with food and incidental money for school events and entertainment, as well as birthday and Christmas gifts.

On March 30, 2005, the Creditor filed the instant complaint, asserting that the Debtor's obligation to pay the debts, as well as his other obligations with regard to child support and maintenance of insurance, is nondischargeable pursuant to section 523(a)(5). Alternatively, the Creditor contends that the debts are nondischargeable under section 523(a)(15).

CONCLUSIONS OF LAW

In order for a debt to be nondischargeable under section 523(a)(5), the creditor must establish that: 1) the debt at issue is owed to a "spouse, former spouse, or child" of the debtor; 2) the debt is "actually in the nature of" (as opposed to simply designated as) alimony, maintenance, or support"; and 3) the debt was incurred "in connection with a "separation agreement, divorce decree or other order of a court of record." *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (citing 11 U.S.C. § 523(a)(5)). In this case, the parties do not dispute the fact that the Debtor's obligation to pay the mortgage payment is a debt owed to a former spouse of the Debtor or that the debt was incurred in connection with the parties' divorce decree. Accordingly, the Court need only determine whether the Debtor's obligation to pay the mortgage payment is "actually in the nature of support."

The question of whether a debt constitutes "support," within the meaning of section 523(a)(5), is a question of federal law. *In re Strickland*, 90 F.3d 444 (11th Cir. 1996). "Thus, a label placed upon the obligation by the consent agreement or court order which created it will not determine its subsequent dischargeability in bankruptcy." *In re Robinson*, 193 B.R. 367, 372 (Bankr. N.D. Ga. 1996) (Drake, J.). Instead, the Court should consider the intent of the court and the parties in including certain provisions within the divorce decree. If the evidence suggests that the obligation was imposed upon the debtor as a means of providing support for the parties' children or the debtor's former spouse, the Court should find that the obligation is in the nature of support. On the other hand, if the evidence suggests that the obligations were an attempt to divide the marital property or

liabilities, the Court should find that the obligation is not in the nature of support. In determining the intent of the parties, it is helpful for the Court to consider such factors as: 1) whether the obligation is tied to a contingency, such as a child reaching the age of majority; 2) whether the obligation appears to have been imposed as a means of balancing the disparate incomes of the parties; 3) whether the obligation is payable in a lump sum or in installments; 4) the respective physical health of the spouses and their levels of education; and 5) whether there was an actual need for support at the time of the divorce. *Id.* The burden of proof on the issue of whether a debt is nondischargeable under section 523(a)(5) rests with the creditor. *Id.*

Having considered the provisions of the divorce decree, as well as an order entered by the state court judge on November 30, 2004, interpreting the obligation at issue, and the testimony of the parties in light of the above-referenced factors, the Court concludes that the obligation to pay the five debts at issue was not intended to provide support to the Creditor or the to the Debtor's children. The state court's November 30th Order states that the "nature of the payments" was "substantially in the nature of property division." Additionally, the Creditor received over \$1400 per month for child support, as well as the marital residence with approximately \$100,000 of equity, and the Debtor was ordered to pay two-thirds of the children's medical bills and pay the full cost of medical insurance for the children. It appears to the Court that the obligation to pay these debts was intended to be a division of liabilities, rather than additional support.

There remains a question as to whether the Debtor's obligation to pay these debts is

nondischargeable under section 523(a)(15). Section 523(a)(15), which was added to the Bankruptcy Code in 1994, operates to make all divorce-related obligations subject to a presumption of nondischargeability. *Cleveland v. Cleveland (In re Cleveland)*, 198 B.R. 394, 397 (Bankr. N.D. Ga. 1996) (Drake, B.J.). Section 523(a)(15) provides as follows:

(a) a discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor. . . .

11 U.S.C. § 523(a)(15). This statute was designed to make it more difficult for a debtor to discharge divorce-related debts. *Smolinski v. Arnott (In re Arnott)*, 210 B.R. 651, 655 (Bankr. S.D. Fla. 1997); *Anthony v. Anthony (In re Anthony)*, 190 B.R. 433, 436 (Bankr. N.D. Ala. 1995). Notwithstanding that purpose or intent, section 523(a)(15) is limited in two respects. First, the exception does not apply if a debtor lacks “the ability to pay” the marital debts. Second, the exception does not apply if a discharge would benefit the debtor more than it would harm the creditor. Inasmuch as section 523(a)(15) is phrased in the

disjunctive, a debt must be discharged if a debtor meets either of the two exceptions. Regarding the burden of proof regarding a section 523(a)(15) claim, the “creditor bears the initial burden of establishing that the debt owed to it actually arose in connection with a divorce or separation agreement.” *Cleveland*, 198 B.R. at 397. “From and after that point, however, the burden of coming forth shifts to the debtor, thereby requiring him to demonstrate either (1) that he lacks the ability to pay the debt in question from income and property not necessary for the support of himself and his dependents, or (2) that the allowance of a discharge would produce benefits exceeding any consequent harm to the Creditor.” *Id.* at 397-98.

That the Debtor’s obligation to pay these debts arose by virtue of a divorce decree is undisputed. Thus, the burden shifts to the Debtor to prove that an exception to section 523(a)(15) applies. At trial, the Debtor presented testimony that focused on the “ability to pay” exception. *See* 11 U.S.C. § 523(a)(15)(A). This Court has previously held that the proper focus of the “ability to pay” analysis is the totality of a debtor’s financial circumstances, with an emphasis on the following factors:

- (1) the debtor’s “disposable income” as measured at the time of trial;
- (2) the debtor’s opportunities for more lucrative employment;
- (3) the extent to which the debtor’s burden of debt will be lessened in the near term; and
- (4) the extent to which the debtor previously has made a good faith effort to fully employ himself and to satisfy the debt in question.

Cleveland, 198 B.R. at 398; *Humiston v. Huddelston (In re Huddelston)*, 194 B.R. 681, 688 (Bankr. N.D. Ga. 1996) (Drake, B.J.). In so holding, the Court reasoned that “[a]bsent such

an expansive inquiry, no certain conclusion may be had regarding the debtor's true capacity to satisfy those debts which came as a consequence of his divorce." *Huddelston*, 194 B.R. at 689.

As to the Debtor's disposable income at the time of trial, the evidence supports the Debtor's testimony that he lacks the disposable income to pay these debts. The Debtor's take-home pay is approximately \$1800 per month, while his expenses total \$2200 per month. Even if the Debtor ceased contributions to his retirement account of \$124 per month and his charitable contribution to the United Way of \$22 per month, the Debtor would not have sufficient funds to repay these debts from his disposable income. The Debtor's testimony also supports a finding that the Debtor does not have any opportunity for more lucrative employment. He does not expect to be promoted or to receive a raise, and his expectation is based on the fact that he has not received a raise in three years and will not receive a raise this year, as well as the fact that his employer has been outsourcing much of the work in his department. Similarly, the Debtor's testimony demonstrates that he does not expect a significant reduction in his expenses in the near future.

Finally, having considered all of the facts in this case, the Court concludes that the Debtor has made a good faith effort to ensure that he is fully employed and to satisfy his obligations under the divorce decree. The Debtor has maintained steady employment and has found additional ways in which to earn income. He has continued to make his child support payments and to provide for the health insurance needs of the minor children while providing a home for the oldest child. He has also provided food, incidentals, and gifts for

the three children who do not reside with him whenever he has visitation with the children.

The Court has also considered the Creditor's argument that the Debtor should be required to liquidate his remaining five shares of IBM stock to assist him in repaying her for the divorce-related debts. If liquidated, this stock would produce only \$400. This sum is not significant enough to require the conclusion that the Debtor can afford to repay the debt to the Creditor. Accordingly, the Court concludes that the Debtor has satisfied his burden of establishing that, pursuant to section 523(a)(15), the debt is dischargeable.

CONCLUSION

Having given this matter its careful consideration, the Court concludes that the Creditor is entitled to only a portion of the relief requested in her complaint. The Debtor's obligation to make child support payments, to pay two-thirds of the children's medical care, and to maintain insurance for the children's benefit is nondischargeable pursuant to section 523(a)(5). The Debtor's obligation to repay the Creditor for paying the debts allocated to him in the divorce decree is dischargeable pursuant to section 523(a)(15).

IT IS SO ORDERED.

At Newnan, Georgia, this 13 day of December, 2006.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE